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THE CORPORATION TRUST COMPANY AND ASSOCIATED COMPANIES

Several interesting Delaware decisions are reviewed in this issue. In one, the president of a Delaware company, which he controlled, was held accountable to it for profits received indirectly at its expense through its relations with other corporations also controlled by him. (See page 246.) In another, the Chancellor ruled that a stockholder whose right to vote at an election of directors is challenged, need not be a party to a proceeding reviewing the election's validity. (See page 247.) In a third case, a charter provision for payment upon liquidation of "all unpaid dividends" was regarded as requiring payment of cumulative dividends rather than only such dividends as had been declared but not paid. (See page 247.)

Raymond Kenway

President.

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The Corporation Journal is published by The Corporation Trust Company, monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for November

What Constitutes Doing Business*

Maintaining a Stock of Goods Within a State

If a stock of goods is maintained by an unlicensed foreign corporation within a state, from which it makes deliveries to customers in that state, the corporation is regarded as "doing business" and is therefore required to be licensed to carry on business within the state.[1]

[1] **Alabama:** *Paul et al. v. W. G. Patterson Cigar Co.*, 98 So. 787; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304. **Arkansas:** *Miellmier v. Toledo Scale Co.*, 193 S. W. 497. **Colorado:** Stats., 1935, Ch. 41, Sec. 73, provides corporation must qualify before owning real or personal property in state. **Florida:** *Reliance Fertilizer Co. v. Davis*, 169 So. 579. Rev. General Statutes, 1927, Sec. 6026, provides no foreign corporation shall hold or dispose of property in Florida without first qualifying. **Georgia:** *Kehrer v. Stewart*, 197 U. S. 60. Corporations owning property in Georgia are subject to the annual license tax. **Idaho:** *Adjustment Bureau v. Conley*, 255 Pac. 414. **Illinois:** *Union Cloak & Suit Co. v. E. Carpenter et al.*, 102 Ill. App. 339. Where a warehouse is maintained in Illinois and contracts for delivery to Illinois customers of goods in the warehouse are completed outside the state, this does not constitute doing business in Illinois. *Thomas Mfg. Co. v. Thede*, 186 Ill. App. 248; *Marshall Milling Co. v. Rosenbluth*, 231 Ill. App. 325. **Iowa:** Report of Attorney General, 1928, p. 235. **Kansas:** *Elliott v. Parlin & Orendorff Co.*, 81 Pac. 500. **Kentucky:** *City of Newport v. French Bros. Bauer Co.*, 183 S. W. 532. **Louisiana:** *R. J. Brown Co. v. Grosjean*, 180 So. 634. *(See page 255.)* **Maine:** *Dominion Fertilizer Co. v. White*, 96 Atl. 1069. **Maryland:** Attorney General's Opinions, 1921, Vol. 6, p. 109. **Massachusetts:** *Cheney Bros. v. Commonwealth*, (*Lanston Monotype* case) 246 U. S. 147. **Michigan:** *E. A. Lange Medical Co. v. Brace et al.*, 152 N. W. 1026. **Minnesota:** *Thomas Mfg. Co. v. Knapp*, 112 N. W. 989. **Mississippi:** *Singer Mfg. Co. v. Adams*, 165 Fed. 877, appeal dismissed, 216 U. S. 617. **Missouri:** *Kelly Broom Co. v. Mo. Fidelity & Casualty Co.*, 191 S. W. 1128. **Nebraska:** Reports of Attorney General, 1927-8, p. 119. **New York:** *American Can Co. v. Grassi Contracting Co., Inc.*, 168 N. Y. S. 689; *Pittsburgh Electric Specialties Co., Inc. v. Rosenbaum*, 169 N. Y. S. 157. **North Carolina:** *Armour Packing Co. v. Lacy*, 200 U. S. 226. **Ohio:** *Reymann Brewing Co. v. Brister*, 179 U. S. 445. Opinions of Attorney General, 1932, No. 4423. **Oregon:** *Vermont Farm Machinery Co. v. Hall*, 156 Pac. 1073. **Pennsylvania:** *Com. v. American Rolling Mill Co.*, 13 Pa. Corp. Rep. 157. **South Dakota:** Comp. Laws, 1929, Sec. 8902, provides no foreign corporation shall hold or dispose of property in the state unless it is qualified. **Tennessee:** *American Steel & Wire Co. v. Speed*, 192 U. S. 500. **Texas:** *Sonneborn Bros. v. Cureton, Atty. Gen. of Texas*, 262 U. S. 506; *National Cash Register Co. v. Ondrusek*, 271 S. W. 640. **Utah:** R. S., 1933, Sec. 18-8-5, bars unqualified corporation from holding or owning personal property in Utah. **Virginia:** *Dalton Adding Machine Co. v. Commonwealth*, 246 U. S. 498. **Washington:** L. 1937, H. B. No. 531, Sec. 16, provides a corporation must be qualified before holding or disposing of real or personal property in the state. **West Virginia:** 1931 Code, Ch. 31, Art. 1, Sec. 79, provides corporation must be qualified before it can hold property in the state. **Wisconsin:** *Sprout, Waldron & Co. v. Amery Mercantile Co.*, 156 N. W. 158. Wis. Stats., 1929, Ch. 226, Sec. 226.02, subsections 1 and 2 as amended by L. 1931, Ch. 97, provides that no foreign corporation shall hold or dispose of property in Wisconsin until it is licensed to do business in the state.

* *This is one of a series of articles on What Constitutes Doing Business. See page 262 for a list of pamphlets obtainable on this important subject.*

Domestic Corporations

Canada.

Failure to use corporate powers for three years held to result in automatic forfeiture of charter. The Exchequer Court of Canada has ruled, with respect to a Canadian corporation which had transferred all of its property and its business as a going concern in 1926 and thereafter had failed for three years or more to use its corporate powers for any purpose whatsoever, that such a corporation has ceased to exist and was without right to file a petition for the refund of taxes paid to the Crown, by reason of s. 29, c. 33, Statutes of Canada, 1934, providing that if a company "for three consecutive years does not use its corporate powers its charter shall be and become forfeited." The court concluded that the forfeiture takes place automatically, without any procedure on the part of the authorities or the company. *Dominion Distillery Products Co. v. The King*, (1938) 1 D. L. R. 597. L. A. Forsyth, K. C., Oscar Gagnon, L. J. de la Durantaye and J. W. Reid, for suppliant. W. N. Tilley, K. C., E. P. Varcoe, K. C., and C. F. H. Carson, K. C., for respondent.

Delaware.

President of company, through corporations controlled by him, deriving profits at the expense of his own company, held accountable to it. Complainant corporation brought this action against its president and two corporations controlled by him to impress a trust upon 91% of the shares of stock of one of the defendant companies. During a period when the president had completely dominated the activities of complainant, he furthered, through it, the sale of a product of the defendant company in connection with which the trust was sought to be imposed, by means of the use of the complainant's facilities, credit and executive management as fully as if the sale of product had been furthered solely by complainant, although without complainant having profited to an appreciable extent. The Chancellor, after an exhaustive review of the testimony, ruled that complainant was entitled to have the trust sought impressed upon the shares mentioned and to an accounting from the defendants of the profits received by them. *Loft, Incorporated, v. Guth et al.*, Court of Chancery, New Castle County, September 17, 1938. Commerce Clearing House Court Decisions Requisition No. 202526. Clarence A. Southerland of Ward and Gray of Wilmington, David L. Podell, Hays, Podell and Shulman of New York City, Levin, Singer and Newburger of New York City (Clarence A. Southerland of Wilmington, David L. Podell, Herman Shulman, Benjamin Algase, Herbert M. Singer and Herbert L. Barnet of New York City, on the brief) for complainant. Robert H. Richards and Caleb S. Layton of Richards, Layton and Finger of Wilmington, Whitney N. Seymour and Francis X. Fallon, Jr., of Simpson, Thacher and Bartlett, of New York City, for defendants. *(Appeal filed in Delaware Supreme Court, October 14, 1938.)*

Chancellor rules that a stockholder, whose right to vote at an election of directors is challenged, need not be made a party to a proceeding to review the validity of the election. The petitioner challenged the validity of an election of directors of a corporation in which he owned stock with voting rights. He charged that certain shares had been issued without consideration by the corporation to another stockholder and that other directors would have been elected if this stock, issued without consideration, had not been voted. In overruling a demurrer in which it was contended that the court should not deprive such a stockholder of his right to vote on the claim that he was not in fact the owner of the stock, without making him a party to the proceedings and giving him an opportunity to defend his challenged ownership, the Chancellor pointed out that Section 31 of the General Corporation Law, which gives the Chancellor power to determine the validity of elections of officers and directors, "does not require that the person claiming to own the stock shall be before the court," and concluded that his presence was not essential to the review proceedings. *In the Matter of Diamond State Brewery, Inc.*, Court of Chancery, New Castle County, June 3, 1938. Commerce Clearing House Court Decisions Requisition No. 199404. Caleb S. Layton of Richards, Layton and Finger, for petitioner. E. Ennalls Berl of Ward and Gray, for respondent.

Charter provision for payment upon liquidation of "all unpaid dividends" regarded as requiring payment of cumulative dividends, rather than only such dividends as had been declared but not paid. The charter of a corporation provided for the payment of dividends on the preferred stock semi-anually "when and as declared out of the surplus and net earnings" and that upon liquidation, "the holders of the preferred stock shall be paid in full the par value of their shares with all unpaid dividends thereon to the date of such payment before any amount shall be paid to the holders of the common stock." The Supreme Court of Delaware, in applying these provisions in connection with funds remaining in the hands of the receivers of the company, upon liquidation, after the preferred stockholders had been paid the par value of their stock, ruled that the preferred stockholders were not restricted merely to such dividends as had been declared but not paid, but were entitled to the cumulative dividends "accruing through time" up to the date of the payment of the par value of their shares. *Pennsylvania Co. for Insurances on Lives & Granting Annuities et al. v. Cox et al.*, 199 A. 671. Reuben Satterthwaite, Jr., and William S. Satterthwaite of Wilmington, for Frank S. Garrett. Hugh M. Morris and Ivan Culbertson of Wilmington for Pennsylvania Company for Insurances on Lives etc., and A. Merritt Taylor, Trustees under the will of John Sellers, Jr., Robert H. Richards and Robert H. Richards, Jr. (of Richards, Layton & Finger) of Wilmington, for appellees.

Where a charter provision required the consent of 75% of the preferred shares to effect a change in the voting rights of the preferred stock, and an amendment was submitted reducing such con-

sent to 60%, the Court of Chancery holds that a consent of 75% of the preferred shares would be required to effect the adoption of the amendment. Defendant company's charter contained a provision that an affirmative vote or written consent of the holders of 75% of the preferred stock was to be required to change "the designations, preferences and voting powers of the preferred stock, and the restrictions or qualifications thereof." This percentage had been reduced to 60% by an amendment of the charter provision, adopted at a meeting at which only 55% of the outstanding preferred stock voted in favor of the amendment and 30% voted in opposition. Complainant preferred stockholders challenged the legality of the purported amendment. Defendants contended that the affirmative vote of a mere majority of the preferred shares was all that was required to effect the adoption of the amendment. The Chancellor, after discussing the presence of the "75%" requirement in the charter as being intended as a protection to the preferred stockholders who invested their money on the faith of the percentage safeguard, concluded that the amendment altered the voting rights of the preferred stock and, having failed to receive the prescribed 75% vote in its favor, the amendment was held void as against the complainants who never expressed their assent to its adoption. *Sellers et al. v. Joseph Bancroft & Sons Company*, Court of Chancery, New Castle County, July 18, 1938. Commerce Clearing House Court Decisions Requisition No. 201261. Hugh M. Morris and Edwin D. Steel, Jr., of Wilmington, for complainants. Robert H. Richards, Jr., of Richards, Layton and Finger, of Wilmington, Del., and Maurice Walk, of Chicago, Ill., for defendant.

Louisiana.

Inadvertent omission of signature on annual report of corporation supplied stockholder held not to subject president to statutory penalties provided for failure to supply proper report. If the president of a corporation, in furnishing, upon demand of a stockholder, a copy of the corporation's annual report as required by statute under such circumstances, neglects, inadvertently, to sign the report, may statutory penalties be collected from that officer for failure to supply the report? The Supreme Court of Louisiana answers in the negative, in construing the requirements under Act 250 of 1928, remarking: "The intent and purpose of the provisions of Section 39 of the Act was primarily to protect the investing public and necessarily the penalty is incidental to the primary object and we do not think that it was the intention of the lawmakers to penalize an officer who, acting in good faith, mailed the plaintiff an honest and accurate report, but through oversight failed to sign or verify the same, when it is obvious that the shareholder purposely refrained from pointing out the technical defect in the report in order to take advantage of the penalty feature of the statute." *Tichenor v. Tichenor*, 181 So. 863. Sydney J. Parlongue of New Orleans, for appellant. Hubert M. Ansley of New Orleans, for appellee. Rollo A. Tichenor, Sr., in pro. per.

Michigan.

Sole owners of a corporation's stock, making sale of stock and corporate assets on basis of a statement which omitted mention of their claims for loans and salary, held prevented by estoppel from establishing that their claims had not been discharged. At a time when plaintiffs owned the entire stock of defendant company, a statement of its assets and liabilities was prepared by a certified public accountant, who, although aware that plaintiffs had claims against the company for loans and past due salary, did not include these claims as liabilities in the statement, which was used by the plaintiffs as the basis of negotiations for the sale of the stock of the company. This suit was brought subsequently to recover from the corporation the amount of the loans and past due salary. Referring to the purchasers, the Michigan Supreme Court said: "They were purchasing the entire corporate stock and all of the company's assets from the sole owners of the corporation. Plaintiffs consented to the terms and executed the contract based upon the statement of assets and liabilities in which they approved the omission of their claims as accounts due them from the company. When they consented to the contract in which these accounts were omitted from consideration as owing to them by the company they contracted on the written understanding there were no liabilities due from the company to them. Plaintiffs' consent to such an agreement was, in effect, a consent to a discharge of their claims against the company. Under the circumstances, they are estopped from now setting up that there was no discharge of their claims." *Paul et al. v. University Motor Sales Company*, 278 N. W. 714. Charles A. Lorenzo of Detroit, for appellants. Louis J. Colombo of Detroit, for appellee. Commerce Clearing House Court Decisions Requisition No. 194321.

New Jersey.

Attempted attachment of shares of New Jersey company on books of corporation, without actual seizure of certificate representing shares, held ineffective. Complainant, having instituted an action on a contract against defendant in a law court, brought this action in equity against the defendant to restrain the latter from disposing of stock owned in a New Jersey company until such time as the judgment at law could be obtained. Service was made upon the defendant in New York. He entered a special appearance questioning jurisdiction over him. The Court of Chancery set aside the service, upon discovering that the defendant's certificate was in New York, holding ineffective an attempted attachment of the shares on the books of the corporation in New Jersey, inasmuch as the Uniform Stock Transfer Act requires actual seizure of the stock certificate to give validity to attachment or levy upon the shares. *Abraham Elgart v. J. Elgart Mintz et al.*, New Jersey Chancery Court, March 17, 1938. Commerce Clearing House Court Decisions Requisition No. 196616.

New York.

Agreement by stockholders owning shares in equal amounts, to perpetuate themselves as directors, held valid. There was a contract between three equal stockholders of defendant closed corporation providing for the continuance of these shareholders as directors and officers. A meeting of the stockholders was scheduled to be held for the purpose of removing plaintiff as a director and he instituted this action, moving for a temporary injunction against the holding of the meeting. The Supreme Court, Special Term, Kings County, granted the motion, saying: "Where all the stockholders, owning shares in equal amount, agree to perpetuate themselves as directors, such agreement is not invalid." *Davis v. Arguls Gas & Oil Sales Co., Inc., et al.*, 3 N. Y. S. 2d 241. Abraham J. Halprin of New York City, for plaintiff. Rubinton & Coleman of Brooklyn, for defendants.

Surrender of shares by stockholder indebted to corporation, in payment of his indebtedness, upheld, where rights of creditors and other stockholders were not affected. Defendant, a stockholder in a corporation in which plaintiff also held shares, being indebted to the corporation, surrendered his shares in payment of his indebtedness, all directors and stockholders being present at the time the transaction took place. The New York Supreme Court, Special Term, Kings County, said: "We find there is nothing illegal about this transaction. All the directors and all the stockholders were present when this transaction occurred, and such an agreement was perfectly justified in that it did not hurt or prejudice or devalue the stock of any stockholder or injure the rights of any creditor of the corporation." *Dwyer v. Monroe*, New York Supreme Court, Special Term, Kings County, June 4, 1938. Commerce Clearing House Court Decisions Requisition No. 199445.

Ohio.

Pledgee bank held entitled to apply proceeds of corporation's policy on life of sole stockholder, pledged by him as collateral for personal loan, to reduction of indebtedness, under circumstances where there was no constructive fraud shown. "The sole inquiry relates to the validity of the deposit of the life insurance policy with the bank as collateral to secure the indebtedness of Howard T. Eaton, managing officer and sole stockholder of the corporation, The Eaton Builders Supply Company (now insolvent) which took out the insurance policy on the life of Eaton payable to itself, paid the premiums thereon and is named as beneficiary therein; the specific question is: Is the plaintiff as assignee for the benefit of the creditors of the insolvent corporation entitled to replevin the policy from the defendant bank?" The Supreme Court of Ohio, after noting that all of the stockholders had assented to the deposit of the insurance policy as collateral and that at the time the corporation was solvent and that there was no proof of any constructive fraud, held that the assignee for the benefit of creditors was not entitled to replevin

the insurance policy and that the fund which had been received by the bank as the cash surrender value might be applied against the indebtedness. *MacQueen v. The Dollar Savings Bank Co.*, 133 O. S. 579. M. A. Nadler, Paul Z. Hodge and Walter F. MacQueen, for appellee. G. P. & M. E. Gillmer, Philip Fusco and Clarence H. Klinger, for appellant.

Wisconsin.

Amendments, valid under the statutes, legally adopted, held binding upon stockholder, who is deemed to have consented to them in advance upon becoming a stockholder; dividend for specified amount, convertible into stock, ordered to be paid in cash. In an action in which a stockholder sought to restrain his corporation and its officers from carrying out a plan of reorganization through certain amendments of its articles, the Supreme Court of Wisconsin had before it for the first time the question as to how far a stockholder consents to amendments adopted subsequent to the time of acquiring his stock. The court ruled that amendments before it, which were valid under existing statutes and which had been legally adopted, were binding upon the stockholder, inasmuch as he had consented to them in advance when he became a stockholder. The statutory provisions authorizing amendments in effect at the time the stock was acquired are deemed, in the view of the court, to be conditions of the stock certificates and of the corporate charter, and the stockholder consents in advance to the making of such changes as the statutes permit, and an exercise of the right by the state or by a prescribed majority to whom the power may be delegated is neither an impairment nor a breach of the contract.

Dividends had accrued on the preferred stock to the amount of $35 per share. One of the amendments adopted authorized and directed the board of directors to declare and pay a dividend of $20 on each share, the dividend to be paid in convertible dividend warrants which might be exchanged for certain shares of common stock in discharge of all accrued and accumulated preferred stock dividends. The court, upon the stockholder's insistence that a cash payment be made, concluded that a money judgment should have been granted. *Johnson v. Bradley Knitting Co.*, 280 N. W. 688. Poss, Toelle & Schuler (Benjamin Poss and Joseph P. Brazy, of counsel) of Milwaukee, for appellant. Jeffris, Mouat, Oestreich, Wood & Cunningham of Janesville, for respondents.

Wyoming.

Mandamus for inspection of corporate books denied where relator's title to stock was questionable. Relator sought by mandamus to compel a corporation to permit him to inspect its books and records. The corporation had refused inspection on the ground that relator's title to the stock he held was questioned. The Supreme Court of Wyoming upheld the lower court in denying the writ, pointing out that the writ of mandamus is an extraordinary remedy, to be invoked

NTATION

But... as the famous old recipe for Potted Hare began, "First catch your Hare," so the recipe for Statutory Representation, CT style, really begins "First get your lawyer." For to have CT Representation a corporation must have a lawyer. There is no other way. That was made The Corporation Trust Company's policy at its founding in 1892, has been its policy ever since.

only on special occasions and not to be issued as a matter of course, and that the writ will be refused if the question upon which the right to it depends is a debatable one. *State ex rel. Moore v. Van Tassell Real Estate & Live Stock Co.*, Commerce Clearing House Court Decisions Requisition No. 197672; 79 P. 2d 476. John C. Pickett and Carleton A. Lathrop of Cheyenne, for appellant. J. A. Greenwood of Cheyenne, for respondents.

Foreign Corporations

Arkansas.

Service of process set aside where made upon unlicensed corporation engaged solely in interstate commerce within the state. The defendant unlicensed foreign corporation solicited orders in Arkansas obtained by salesmen selling by sample, the orders being sent to and filled from its Tennessee branch. In holding service of process made upon a company operating in this manner to be invalid, the Supreme Court of Arkansas said: "The authorities seem to be unanimous in holding that the solicitation and obtaining of orders for goods within a state by a salesman of a foreign corporation for goods to be shipped into the state to the purchasers is not doing business within the state so as to render the corporation amenable to service of process therein." *H. J. Heinz Co. et al. v. Duke*, Commerce Clearing House Court Decisions Requisition No. 197520; 116 S. W. 2d 1039. McRae & Tompkins of Prescott, for appellants. W. F. Denman of Prescott, and Joe Norbury and Tom W. Campbell of Little Rock, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, Arkansas volume, page 513.

Connecticut.

Solicitation of contracts for insertion of names in publication printed by foreign corporation in another state held not "doing business" so as to necessitate qualification. There are so few Connecticut "doing business" cases to be found in the reports that a recent decision on the subject by the Connecticut Supreme Court of Errors is of special interest. A New York corporation had its principal place of business in New York City, where, among other publications, it printed a book listing insurance attorneys throughout the country. An agent of the company solicited contracts in Connecticut for the listing of attorneys' names, the contracts being forwarded to the New York office for acceptance. An office of the corporation was maintained in Hartford, Connecticut, for the accommodation of agents and subscribers in communicating with the home office. The company had no bank account, money or property in Connecticut, and there was no representative constantly in the state. The court, regarding the contracts as New York contracts, because accepted there, ruled that the corporation was not "doing business" in Connecticut so as to require it to be qualified when suing upon a

contract solicited and consummated in the way outlined. The presence of the New York company's name on the Hartford office door and in the local telephone book was not regarded as bringing the corporation within the statutes requiring qualification. *Alfred M. Best Company, Inc. v. Goldstein,** 1 A. 2d 140. Bernard P. Kopkind, Clarence A. Hadden, Daniel Pouzzner and William L. Hadden of New Haven, for appellant. Maxwell H. Goldstein of New Haven, pro se. Commerce Clearing House Court Decisions Requisition No. 210410.

* The full text of this opinion is printed in **The Corporation Tax Service**, Connecticut volume, page 134.

Louisiana.

An unlicensed foreign corporation purchasing, selling and delivering goods in Louisiana is "doing business" there and precluded from maintaining suit. Plaintiff, an unlicensed foreign corporation in Louisiana, sued to recover kerosene taxes and inspection fees paid under protest. It was met by the defense that it was not authorized to do business in the state and, having carried on business, it had failed to pay taxes due and that, as a result, it was barred under Act No. 8, Third Extra Session of 1935, from maintaining a suit in the state. The Supreme Court of Louisiana, noting that plaintiff had purchased, sold and delivered merchandise in Louisiana, ruled that it was not engaged in interstate business or commerce. A judgment for the defendant was affirmed. *R. J. Brown Co. v. Grosjean, Supervisor of Public Accounts,** 180 So. 634. Porteous, Johnson & Humphrey of New Orleans, for appellant. Gaston L. Porterie, Atty. General, and Justin C. Daspit, F. A. Blanche and E. Leland Richardson, Sp. Asst. Attys. General, for appellee.

* The full text of this opinion is printed in **The Corporation Tax Service**, Louisiana volume, page 516.

Minnesota.

Service of process upheld where made upon soliciting agent authorized to demonstrate corporation's products at conventions and to adjust differences between corporation and persons within state. An unlicensed foreign corporation had a salesman in Minnesota who solicited orders which were accepted in Ohio and filled by shipment from that state to customers within Minnesota. While the salesman was without power to contract for the company, to receive payment or extend credit, he adjusted differences between the foreign corporation and a jobber in Minnesota with whom it dealt. He also attended conventions in the state at which the corporation's products were displayed. The home office manager of the company also attended such conventions in furtherance of its interests. The Supreme Court of Minnesota, from these facts, upheld service of process made upon the salesman as agent of the company in Minnesota. *Dahl et al. v. Collette et al.*, 279 N. W. 561. Commerce Clear-

ing House Court Decisions Requisition No. 196109. Ernest E. Watson and C. E. Warner of Minneapolis, for appellant. Julian E. Morten of Redwood Falls and Burnett, Bergeson & Haakenstad of Fargo, N. D., for respondents.

* The full text of this opinion is printed in **The Corporation Tax Service, Minnesota volume, page 203.**

New York.

Service of process vacated where made upon president of corporation entering state to make occasional purchases. At the time service was made upon defendant foreign corporation, its president, who received the summons and complaint, was in New York primarily on personal business but had in his possession several bundles of merchandise purchased for defendant company. It was conceded that he came into New York City occasionally to purchase merchandise. The New York Supreme Court, Special Term, Kings County, vacated the service upon this showing of facts, on the ground that the more recent New York decisions are to the effect that the buying of goods, even if systematic, is insufficent to constitute doing business here for the purposes of service of process. *Cohen & Salwen v. Max Richter & Co Inc.*,* New York Supreme Court, Special Term, Kings County, June 4, 1938. Commerce Clearing House Court Decisions Requisition No. 199446.

* The full text of this opinion is printed in **The Corporation Tax Service, New York, page 248.**

Service of process upon Secretary of State in derivative action against foreign corporation, withdrawn from state, based on obligation incurred prior to withdrawal, upheld. Plaintiff stockholders of appellant Delaware company, which had filed its certificate of surrender of authority to do business in New York, instituted this action on behalf of themselves and their corporation by service of process upon the Secretary of State. By statute, the surrender of authority carried with it consent by the corporation to service upon the Secretary of State in an action upon any liability or obligation incurred by the corporation in New York before the filing of the certificate of surrender of authority. The Court of Appeals of New York upheld the service, upon finding the complaint contained allegations of wrongful diversion of property of the corporation by a stockholder owning 51 per cent of its stock and directors of the company, all of whom were residents of New York, and who were defendants in the suit. The court felt that "under the circumstances alleged in the complaint a duty rested upon appellant corporation to institute an action against the other defendants to recover its property so wrongfully abstracted," and that the action was one based "upon an obligation incurred by this appellant within this state before the filing of its certificate of surrender of authority." *Thorne et al. v. Brand et al.*, 277 N. Y. 212, 14 N. E. 2d 42. Edmund M. McCarthy of New York City, for appellant. Meyer Kraushaar of New York City, for respondents.

Taxation

Illinois.

Additional initial license fees held due where a reduction in authorized capital stock was followed by an increase to the previous level, accompanied by issuance of shares. Prior to the enactment of the present Illinois Corporation Act, appellant corporation paid to the State license fees in connection with its authorized capital stock to the extent of thirty million dollars. Just before the enactment of the Act, a reduction in its authorized capital stock to fifteen million dollars was effected, of which shares of the par value of $11,381,100 were outstanding. The Corporation Act, passed in 1933, based initial license fees on issued capital stock rather than authorized capital stock. In 1936, appellant amended its charter increasing its authorized capital stock to thirty million dollars once more. It seeks to recover license fees paid under protest upon additional shares issued for a consideration of $8,835,000, contending that, having once paid a license fee entitling it to an authorized capital of thirty million dollars, it was not liable to a further license fee within that limit. The Illinois Supreme Court affirmed a decree denying a recovery, ruling that appellant had waived its right to issue shares to that extent when making the voluntary reduction in its authorized capital stock. *Butler Bros. v. Martin et al.,** 15 N. E. 2d 843. Commerce Clearing House Court Decisions Requisition No. 199354. Scott, MacLeish & Falk and Brown, Hay & Stephens of Chicago (Leland K. Neeves of Chicago and Robert A. Stephens, Jr., of Springfield, of counsel), for appellant. Otto Kerner, Atty. General, (P. C. Otwell of Belleville, and J. A. Londrigan of Springfield, of counsel), for appellees.

*The full text of this opinion is printed in **The Corporation Tax Service**, Illinois, page 503.

Louisiana.

Federal trustee held subject to payment of Louisiana corporate franchise tax. In an action by the Secretary of State of Louisiana to recover a corporation franchise tax from the trustee of a company in reorganization proceedings under Section 77 of the Bankruptcy Act, the United States Circuit Court of Appeals, Eighth Circuit, disposed of the contention of the trustee that a tax was not due from him as trustee by pointing out that under Section 124a, Title 28, U. S. C. A., trustees appointed by any United States Court to conduct any business are subject to all state and local taxes applicable to such business the same as if it were conducted by an individual or corporation and that "by the sweeping terms of this statute all doubts have been resolved in favor of the state taxes." A decree in favor of the Secretary of State was affirmed. *Guy A. Thompson, Trustee, Missouri Pacific Railroad Company v. The State of Louisiana et al.,** United States Circuit Court of Appeals, Eighth Circuit, July

18, 1938. Commerce Clearing House Court Decisions Requisition No. 201203. James M. Chaney, for appellant. Charles J. Rivet, Sp. Asst. to Atty. General, (Gaston L. Porterie, Atty. General, and D. M. Ellison, Sp. Asst. to Atty. General, on the brief), for appellees.

*The full text of this opinion is printed in **The Corporation Tax Service, Louisiana, page 1576.**

New York.

State franchise and city sales tax claims, whether assessed or not, share pro rata in the distribution of an insolvent corporation's estate, unless steps have been taken to enforce either tax. The Supreme Court, Kings County, holds that, where there has been an assignment for the benefit of creditors, the State of New York and the City of New York stand on an equal footing as to their claims for payment of the state corporate franchise tax and the city sales tax, respectively, where, prior to the assignment, neither tax had been computed or assessed. On rehearing, the court indicated that even though the state tax had been computed and assessed, "it cannot serve to advance the sovereign preference of the state in the collection of the franchise tax over the sovereign preference of the city in the collection of the sales tax. Until one or the other is actually enforced they both stand on an equal footing." *In re general assignment for benefit of creditors of Paris Shoe Co., Inc.,** 2 N. Y. S. 2d 451. George Napolino of Long Island City, for assignee. Paul Windels, Corp. Counsel (Edmund B. Hennefeld, of counsel) of New York City, for City of New York. John J. Bennett, Jr., Atty. General, (George F. Mullay, of New York City, of counsel), for the State.

*The full text of this opinion is printed in **The Corporation Tax Service, New York, page 1121.**

Ohio.

Use Tax is held valid by County Court of Appeals. In an action brought against an individual charged with failure to pay the use tax to the State of Ohio, the Darke County Court of Appeals has held that the tax does not violate any provisions of either the federal or state constitutions. *State of Ohio v. Fields,** Darke County Court of Appeals, July 15, 1938. Commerce Clearing House Court Decisions Requisition No. 202039.

*The full text of this opinion is printed in **The Corporation Tax Service, Ohio, page 6834.**

Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

CALIFORNIA. Docket No. 302. *Felt and Tarrant Manufacturing Co. v. Corbett et al.*, 23 F. Supp. 186. (The Corporation Journal, June, 1938, page 208.) Validity of the California Use Tax. **Appeal filed, August 26, 1938. Probable jurisdiction noted, October 10, 1938.**

DELAWARE—WISCONSIN. Docket No. 84. *John J. Morris, Jr., Trustee in Bankruptcy for Central Telephone Company v. Marshall E. Sampsel et al.*, 272 N. W. 53. (The Corporation Journal, June, 1937, page 414.) Bankruptcy—suit by trustee for recovery of dividends illegally paid by insolvent corporation. **Appeal filed, June 3, 1938. Petition for writ of certiorari denied, October 10, 1938.**

FEDERAL. Docket No. 46. *William B. Scaife & Sons Company v. William Driscoll, Collector of United States Internal Revenue*, 94 F. 2d 64. (The Corporation Journal, October, 1938, page 231.) Amendment of capital stock tax return. **Appeal filed, May 17, 1938. Petition for writ of certiorari denied, October 10, 1938.**

OKLAHOMA. Docket No. 79. *Indian Territory Oil and Gas Company v. Indian Territory Illuminating Oil Company*, 93 F. 2d 711. (The Corporation Journal, October, 1938, page 227.) Interference with corporate name. **Appeal filed, June 1, 1938. Petition for writ of certiorari denied, October 10, 1938.**

WEST VIRGINIA. Docket No. 161. *United Artists Corporation v. James*, 23 F. Supp. 353. (The Corporation Journal, October, 1938, page 234.) Taxation of gross income from lease of motion picture films in interstate commerce. **Appeal filed, June 30, 1938. Probable jurisdiction noted, October 10, 1938.**

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* Data compiled from CCH **U. S. Supreme Court Service, 1938-1939.**

Regulations and Rulings

CALIFORNIA—A foreign corporation, having no salesmen or any direct agent or a stock of goods in the state, and merely represented there by an independent contractor, such as a manufacturer's agent, or a broker, or which merely ships goods to customers in the state, is not to be regarded as subject to the Corporation Income Tax Act of 1937, in the opinion of the Assistant Tax Counsel. (California CT (Corporation Tax) Service, ¶ 14-703.)

GEORGIA—A corporation having no capital stock and not incorporated for pecuniary gain must pay the fees required by the Secretary of State for its certificate of organization under Section 5 of the 1938 Corporation Law. (Opinion of the Attorney General.)

LOUISIANA—State unemployment compensation contributions are deductible by employers and by employees for state income tax purposes. Federal old age benefits are deductible by employers, but not by employees, for state income tax purposes. Assumption by employer of payment of employee's Federal old age benefits contributions constitutes payment of additional salary. (Ruling of Income Tax Division of Louisiana Department of Revenue, Louisiana CT, ¶ 1552.)

MISSISSIPPI—The Federal Excess Profit Taxes cannot be deducted from gross income for state income tax purposes. (Opinion of Attorney General to the Income Tax Division, Mississippi CT, ¶ 1535.)

MISSOURI—The State Auditor's Office has issued a memorandum to the effect that a Missouri corporation having no branch office outside the state is subject to income tax to the State of Missouri on 100% of its income. (Missouri CT, ¶ 1544.)

SOUTH CAROLINA—The South Carolina Tax Commission has ruled that the Federal excess profits tax and the Federal surtax on undistributed profits are not allowable as deductions on South Carolina income tax returns. (South Carolina CT, ¶ 1529.)

TENNESSEE—The Attorney General has rendered an opinion to the Department of Finance and Taxation to the effect that a foreign corporation transacting intrastate business in Tennessee is liable for franchise and excise taxes, even though it is not required to file its charter with the Secretary of State because of the provisions of Chapter 106 of the Acts of 1937. (Tennessee CT, ¶ 1981T.)

UTAH—The Utah Tax Commission has ruled that foreign corporations which make deliveries from stocks of goods located in Utah, pursuant to orders taken by agents in that state, are engaged in intrastate business and are taxable under the Corporation Franchise Tax Act, even though they have no office or regular place of business in Utah. The Commission has also ruled that, in general, foreign corporations which have neither agents nor stocks of goods in Utah, and which engage in no other activities there, are not doing business in the state and are not subject to the Franchise Tax, even though goods are shipped to customers in Utah, pursuant to orders received by mail, telephone or telegraph. (Utah CT Service, page 1187.)

Some Important Matters for November and December

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Notification Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

ALASKA—Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January. —Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20.—Domestic Corporations.

GEORGIA—Annual License Tax Report and Tax due on or before January 1.—Domestic and Foreign Corporations.

NEW YORK—Second installment of Income Tax of Business Corporations due on or before November 15 (or within 30 days after notice, if given later than October 15; payable not later than January 15, in any event).—Domestic and Foreign Business Corporations other than real estate and holding companies.

Supplementary Franchise Tax Return (Form 60 CT) due on or before November 30.—Domestic and Foreign Corporations organized or qualified between May 15 and November 1 of current year.

UNITED STATES—Fourth Installment of Income Tax imposed for the calendar year 1937 due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

The Corporation Trust Company's Supplementary Literature

In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets and forms, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York, N. Y.

When a Corporation Leaves Home. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

We've Always Got Along This Way. This is a 24-page pamphlet giving brief digests of cases in various states in which corporation officials who had thought they were getting along very well with corporate representation by a business employe suddenly found themselves penalized in unusual and often embarrassing ways: such as one company that had to pay its employe-representative's alimony.

What! *We* Need a Transfer Agent? Nonsense! The foregoing is the title of a pamphlet which describes in detail, with many illustrations, the exact steps through which a stock certificate goes in being transferred from one owner to another by an experienced transfer agent—purpose being to enable any corporation official to judge more accurately whether or not his own company should use the services of a transfer agent.

Judgment by Default. Gives the gist of Michigan Supreme Court case of Rarden v. Baker and similar cases in other states, showing how corporations qualified as foreign in any states and utilizing their business employes as corporate representatives are sometimes left defenseless in personal damage and other suits.

A Corporation's Achilles Heel. Containing the complete text of the opinion of the Supreme Court of the United States in State of Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, State of Washington, of the Supreme Court of New Mexico in Silva v. Crombie & Co., and of the Supreme Court of Michigan in Rarden v. R. D. Baker Co.—three decisions of great significance to attorneys of corporations qualified in one or more states.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation, completely revised to reflect the changes made by the amendments of 1937.

What Constitutes Doing Business. (Revised to September 1, 1937.) A 168-page book containing brief digests of decisions selected from those in the various states, as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index makes them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.